

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
ED MIR SERVICE STATION, INC.	:	DETERMINATION
AND EDDIE DAVID	:	DTA NOS. 819515
	:	AND 819516
for Revision of Determinations or for Refund of Sales and	:	
Use Taxes under Articles 28 and 29 of the Tax Law for the	:	
Period June 1, 1997 through May 31, 2000.	:	

Petitioners, Ed Mir Service Station and Eddie David, 92 Thunder Road, Holbrook, New York 11741, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1997 through May 31, 2000.

A hearing was held before Catherine M. Bennett, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on February 19, 2004 at 10:30 A.M., with all documents and briefs to be submitted by January 5, 2005, which date began the six-month period for the issuance of this determination. Petitioners appeared by Lloyd W. Winfield, CPA. The Division of Taxation appeared by Christopher C. O'Brien, Esq. (Cynthia E. McDonough, Esq., of counsel, at hearing, and Nicholas A. Behuniak, Esq., of counsel, on the brief).

ISSUE

Whether the Division of Taxation properly determined that petitioners, Eddie David and Ed Mir Service Station, Inc., calculated greater prepaid tax credits than allowed by law on Ed

Mir Service Station, Inc.'s sales and use tax returns reporting sales of motor fuel by the company.

***FINDINGS OF FACT*¹**

1. Petitioner Ed Mir Service Station, Inc. operated an Exxon gas station ("the station") and small convenience store in Bohemia, Suffolk County, New York, during the period in issue. The service station had both full-service and self-service gasoline pumps, an automotive repair business and a small convenience store. Petitioner Eddie David was the president and sole shareholder of the station. The business was sold in May 2000.

2. In September 2000, the Division of Taxation's ("Division") Brooklyn district office commenced a sales tax field audit of the station by sending an audit appointment letter and written request for the station's records. Petitioners failed to provide the Division with a substantial amount of their books and records after several requests. As a result, the Division estimated the station's sales tax liability, which included a component amount for excessive tax credits allegedly taken by the station.

3. The Division issued a Notice of Determination to Ed Mir Service Station, Inc. dated December 31, 2001 (Assessment No. L-020384038-9) assessing additional sales and use taxes, plus penalties and interest, in the amount of \$56,311.39.

The Division issued a Notice of Determination to Eddie David dated January 7, 2002 assessing additional sales and use taxes in the amount of \$33,715.83 plus penalties and interest for a total of \$56,783.49.

4. After a hearing was held in this matter before the Division of Tax Appeals, petitioners submitted a substantial portion of the station's books and records, and after having had a chance

¹ The Division of Taxation's request for findings of fact are incorporated herein.

to review them, the Division concluded it would not further challenge the price at which petitioners sold gasoline. Thus, the remaining issue concerns only the prepaid tax credit calculation.

5. As part of the audit, the Division attempted to verify the amount of prepaid tax credit taken by petitioners during the periods in issue. Based upon its estimates, the Division determined that petitioners may have utilized an incorrect amount of prepaid credit in their sales and use tax filings.

6. The calculation of prepaid credit available to a taxpayer is based upon utilization of the applicable published rate for the credit multiplied by the gallons of gasoline sold during a given period.

7. Petitioners filed forms FT-943, Quarterly Inventory Report by Retail Service Stations and Fixed Base Operators, as attachments to the station's New York State and local sales and use tax returns, forms ST-810. On forms FT-943, petitioners noted the gallons of gasoline the station purchased and the gallons sold during any one particular period. The prepaid credit is listed on Form FR, an attachment to Form ST-810.

8. The Division submitted the following computation of excess prepaid credits taken by petitioners during the period in issue:

A Quarter Ended	B Gallons Sold	C Published Prepaid Credit Rate	D Audited Prepaid Credit	E Reported Prepaid Credit	F Excess Prepaid Credit Taken
8/31/1997	275,790	0.087	\$23,993.73	\$25,056.00	\$1,062.27
11/30/1997	235,324	0.087	20,473.19	20,907.00	433.81
2/28/1998	238,159	0.087	20,719.83	21,089.23	369.40

A Quarter Ended	B Gallons Sold	C Published Prepaid Credit Rate	D Audited Prepaid Credit	E Reported Prepaid Credit	F Excess Prepaid Credit Taken
5/31/1998	232,893	0.087	20,261.69	19,894.73	(366.96)
8/31/1998	202,388	0.079	15,988.65	16,857.84	869.19
11/30/1998	195,300	0.079	15,428.70	15,978.93	550.23
2/28/1999	141,982 ²	0.079	11,216.58	10,459.36	(757.22)
5/31/1999	172,586	0.079	13,634.29	15,245.00	1,610.71
8/31/1999	169,279	0.07	11,849.53	14,931.00	3,081.47
11/30/1999	198,684	0.07	13,907.88	16,116.08	2,208.20
2/29/2000	174,321	0.07	12,202.47	17,592.05	5,389.58
5/31/2000	149,598	0.07	10,471.86	15,952.00	5,480.14
Total	2,386,304		\$190,148.41	\$210,079.22	\$19,930.81

9. Petitioners were asked to provide the vendor invoices and backup calculations on the prepaid tax credits for the three randomly chosen quarters ended 5/31/98, 2/29/99 and 2/29/00. The work papers prepared by petitioner's accountant reveal that the prepaid credit for each of the periods ended 5/31/98 and 2/28/99 was calculated at \$19,894.73 and \$10,459.36, respectively, by taking a credit for the actual New York State sales tax at 7% paid to suppliers on fuel purchased during those quarters. The work papers appear to indicate that the prepaid credit for the period ended 2/29/00 was calculated by multiplying 7% times the taxable sales for the quarter of \$251,315.00. The actual sales tax paid on fuel purchases during that quarter was \$12,741.75, based on petitioner's documentation.

² This amount should read 142,982 as reported, thus decreasing the quarterly result by \$79.00, and the overall excess prepaid credit to \$19,851.81.

SUMMARY OF THE PARTIES' POSITIONS

10. Petitioners state that vendor invoices show the prepaid sales tax collected by the vendor and paid by the station each quarter, as well as the gallons of gasoline purchased.

Petitioners maintain that the prepaid sales tax collected by the vendor was the actual cost to petitioners and should be allowed as a credit on the quarterly sales tax return, resulting in no excess credits.

11. The Division argues that petitioners miscalculated the prepaid tax credit applied on the station's sales and use tax returns, and based on petitioners' own books, records and filed returns, it has calculated excessive credits in the amount of \$19,930.81.

CONCLUSIONS OF LAW

A. Pursuant to 20 NYCRR 561.3(a)(1), every distributor of motor fuel must pay a prepaid tax on each gallon of motor fuel which it imports or causes to be imported into New York State for use, distribution, storage or sale in the State. Such tax is imposed on the owner of the motor fuel being imported at the time the offloading is commenced at or into any terminal or other facility. When motor fuel is sold at retail, rather than passing the prepaid tax through to the customer, the seller must collect the state and local sales taxes based upon the actual selling price of the motor fuel less the State motor fuel tax imposed by Tax Law Article 12-A and, where applicable, the New York City tax on leaded gasoline, at the state and local tax rates in effect where the taxable sale occurs. The price upon which the retail sales tax is based must not include the prepaid taxes paid on the fuel (20 NYCRR 561.7[a]). However, the station is permitted a refund or credit for prepaid sales taxes paid by or passed through to it (20 NYCRR 561.9[a]). The amount of the refund or credit allowable is determined at the time the station sells each gallon of fuel (Tax Law § 1120; 20 NYCRR 561.10[a]).

B. The only remaining issue in this matter concerns the calculation of petitioners' prepaid credit. In petitioners' case the credit is claimed by the filing of Form FR, a Report of Sales and Use Tax on Motor Fuel and Diesel Motor Fuel, as an attachment to Form ST-810, the New York State and Local Sales and Use Tax Return Quarterly for Part-Quarterly Filers. Consistent with the Tax Law and regulations concerning the calculation of the credit, the Form FR filing instructions simply indicate that one should:

Enter . . . the total amount of prepaid sales tax either paid by you or included in the price you paid to your supplier of motor fuel and diesel motor fuel **sold or used during the period** (emphasis in original text).

Form FT-943, Quarterly Inventory Report by Retail Service Stations and Fixed Base Operators, another attachment to petitioner's Form ST-810, requires the reporting of fuel by gallons sold or used during the reporting period. Thus, from petitioners' own records the Division obtained the gallons of fuel sold during the reporting period and used this amount to determine the credit to which petitioner was entitled upon the sale of such fuel, the triggering event. Petitioners' attempt to calculate the credits to which the station was entitled by totaling the prepaid sales tax remitted to the supplier during a reporting period, or by a calculation using taxable sales, is rejected as not in accordance with the Tax Law and regulations. Petitioners have not carried their burden of proving that the Division improperly determined excessive tax credits were claimed by the station.

Accordingly, the Division's revised assessment of excess prepaid credits due from petitioner, as modified by the correction noted in footnote 2 herein, will stand.

C. The petitions of Ed Mir Service Station, Inc. and Eddie David are hereby denied, and the revised assessments in accordance with Finding of Fact “8,” as modified by footnote 2, are sustained.

DATED: Troy, New York
June 23, 2005

/s/ Catherine M. Bennett

ADMINISTRATIVE LAW JUDGE